

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:

DEALER MANAGEMENT SYSTEMS
ANTITRUST LITIGATION.

Docket No. 18 C 864

Chicago, Illinois
July 28, 2023
10:02 a.m.

TRANSCRIPT OF PROCEEDINGS - Status
BEFORE THE HONORABLE CHIEF JUDGE REBECCA R. PALLMEYER

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1 (The following proceedings were had in open court:)

2 THE CLERK: 18 CV 864, In Re: Dealer Management
3 Systems Antitrust Litigation.

4 THE COURT: You may be seated.

5 Good morning.

6 MULTIPLE SPEAKERS: Good morning.

7 THE COURT: I wonder if I can get your appearances
8 for the record.

9 We will begin with plaintiffs' counsel.

10 MS. WEDGWORTH: Good morning, your Honor.

11 Peggy Wedgworth from Milberg on behalf of the
12 Dealer class plaintiffs.

13 MR. NEMELKA: Good morning, your Honor.

14 Mike Nemelka on behalf of the Auto Vendor Class and
15 MVSC.

16 And on behalf of Derek Ho, he is not here. He is
17 at trial currently, and he did not want to have to move
18 this -- or request to move this hearing on his account. He
19 apologizes for not being here.

20 MR. ISSACHAROFF: Samuel Issacharoff for the same
21 parties as Mr. Nemelka.

22 MR. DORRIS: Dan Dorris for the same parties as
23 Mr. Nemelka.

24 MS. JONES: And Bethan Jones for the same parties.

25 THE COURT: All right. Thank you.

1 And for the defendants.

2 MS. GULLEY: Good morning, your Honor.

3 Aundrea Gulley for the Reynolds and Reynolds
4 Company.

5 I'm also here with Leo Caseria, as well for the
6 Reynolds and Reynolds Company.

7 And also present in the courtroom are Rick Rauch
8 and Scott Cherry, who are client representatives.

9 MS. MILLER: Good morning, your Honor.

10 Britt Miller on behalf of the CDK. I came alone.

11 THE COURT: Okay.

12 Well, I want to say first, welcome to this
13 courtroom. I know you have been in this court since the case
14 was originally assigned to Judge St. Eve, who has now gone on
15 to greener pastures.

16 I'm happy to have the case before me, and I'm sorry
17 that it has taken me so long to get my arms around it, but I
18 do feel I'm there now.

19 And I appreciate the status report that was
20 submitted yesterday. I had a chance to review that, not in
21 complete detail, but I have certainly read it, and I
22 understand your positions on various things.

23 Let me just give you maybe a quick advance on where
24 I think I am on some of the issues, but I certainly am open
25 to your suggestions or arguments about how I might

1 misunderstand some of this.

2 With respect to AutoLoop in the Western District of
3 Wisconsin, my inclination there is to agree with AutoLoop
4 that the case belongs in Wisconsin for trial. I know that
5 there is a dispute about whether or not the defendant
6 actually agreed to that venue at the time of the case's
7 initiation.

8 This is one of the reasons that, unlike many of my
9 colleagues in this court, I really don't like direct filing
10 orders. I have entered them in at least one MDL. But in
11 general, I'd prefer for cases to be filed in the venue where
12 they are going to be tried and then reassigned by -- through
13 the JPML.

14 That didn't happen in this case. It wasn't my
15 decision in the first place. But my best read on what
16 happened in this case is that the assumption was that the
17 Western District of Wisconsin was the venue for the AutoLoop
18 case.

19 There is also a matter of whether or not this court
20 or the Wisconsin court should decide the class certification
21 motion.

22 On that issue, it seems to me that the expectation
23 on the part of the court and certainly my own willingness
24 would be to handle the class cert. motions before the cases
25 get reassigned.

1 A little bit the same kind of reaction I have
2 got -- and, again, these are my tentative views as opposed to
3 what I might come up with after you argue -- would be, on
4 MVSC and the *Reynolds* case, it looks as though everybody has
5 agreed there that the case should be remanded to the Central
6 District of California. And the only dispute remaining is
7 whether this court or that court should be deciding the
8 sanctions motion.

9 For reasons that elude me, that case -- that motion
10 has not been ruled on or was not ruled on before the case
11 came to me, but I certainly am willing to handle that.

12 So my thought would be that I will handle that and
13 then send the panel, the JPML, this case for reassignment to
14 the Central District of California. Again, that's sort of a
15 first-cut inclination.

16 Then there are disputes about the timing of class
17 cert. motions with respect to the other classes or potential
18 classes and whether those motions should be filed as early as
19 late August of this year or really whether October makes more
20 sense. Call me Solomon here, but I'm likely to suggest a
21 September date.

22 That's the total of my -- of the inclinations that
23 I have got up until now. I know that there are other issues
24 that are presented in the joint status report. You are
25 welcome to argue those to me, as well as tell me where I'm

1 wrong or misunderstand what you have told us already about
2 what should happen next.

3 We can begin with the plaintiffs on this as well.

4 MR. ISSACHAROFF: Your Honor, Samuel Issacharoff
5 for the plaintiffs.

6 I have been serving as coordinating counsel for the
7 MDL, meaning that I just try to keep tabs of who has got what
8 and at what point.

9 We are fine with the Court's rendition of where
10 it's inclined to go.

11 We think that there is a misunderstanding that the
12 defendants consented to the direct filing here. They don't
13 have the option to consent to venue. That's the plaintiffs'
14 call, where we file it. So we agree with the Court that this
15 case belongs in the Western District of Wisconsin.

16 There is one quirk that -- MDLs are difficult, and
17 there is always technical issues.

18 Because it was directly filed here, it's not
19 before -- it doesn't have a case number or anything in the
20 Western District of Wisconsin.

21 THE COURT: Right.

22 MR. ISSACHAROFF: Which means we can't get a trial
23 date until we can go back to that court in some fashion,
24 which was the reason that we were urging the class
25 certification be handled there rather than here, so we could

1 get it moving more quickly.

2 But if it's a September date, we are fine with
3 that. We think that, with regard to the Vendor Class, the
4 AutoLoop side of the equation, that this Court's summary
5 judgment opinion basically addressed all the issues that are
6 going to be presented on class certification, including
7 through *Daubert*, the admissibility of the evidence on how
8 damages would be calculated on a class-wide basis.

9 So we don't really see that it's a big issue. I
10 mean, the defense may take a 23(f) appeal, as is, of course,
11 their right.

12 THE COURT: Sure.

13 MR. ISSACHAROFF: But we are basically fine with
14 how the Court is going to do it.

15 We might urge a little consideration to try to get
16 us to Wisconsin as quickly as possible. We have been under
17 sort of a mandate from the Seventh Circuit to get this case
18 moving. I think it's been five years now that we have been
19 trying to get it moving. So we are at the stage where we are
20 ready. We could go to trial tomorrow either on behalf of
21 AutoLoop individually or on behalf of the class. Everything
22 is completed in this case.

23 So that's all we have really.

24 THE COURT: You are, of course, welcome to withdraw
25 the motion for class cert.

1 MR. ISSACHAROFF: Yes, we would be welcome to do
2 that. I think we might -- I would have to confer with my
3 clients, but I suspect not, your Honor.

4 THE COURT: Note that whichever -- obviously, an
5 earlier number gives you a better chance at an early trial
6 date in any venue. So if this case were to be tried by me,
7 an 18 C case is likely to get bumped up ahead of a 22 C case.

8 With respect to class cert. and the potential
9 appeal, as it works out, same Court of Appeals. So, I mean,
10 that kind of helps.

11 If there is a way we can expedite this, I can
12 certainly consider that.

13 You know, while I have got you here,
14 Mr. Issacharoff, one thing I didn't mention when I was giving
15 you my rough -- here is my rough sense of where we are --
16 *Shady Grove*, we didn't talk about that.

17 My thought there -- I realize there is no motion
18 right now for interlocutory appeal, but my inclination would
19 be to grant that -- such a motion, such that it looks as
20 though everybody agrees the case can proceed in the meantime,
21 but you would have a chance to get the Court of Appeals'
22 views on what I think really is a contested issue and as to
23 which reasonable minds can and have differed.

24 So that's just -- I wanted to add that to the
25 comments I made earlier.

1 Okay. Any other comments you wanted to make?

2 MR. ISSACHAROFF: No, your Honor.

3 Again, we had a fallback position in our papers
4 that, if the Court would entertain severing the two class
5 certifications, ours could go forward even earlier.

6 I think Ms. Wedgworth might have reasons that she
7 might need more time. We really don't see them as
8 symmetrical issues because of the direct/indirect purchaser
9 sides of the equation.

10 So if the Court were inclined, as it obviously is,
11 to handle the class certification motion, again, our only
12 request is to have ours move forward as quickly as possible.
13 But that's been our request in this case for a very long time
14 now.

15 THE COURT: Right.

16 You know, I think my sense of the history here was
17 the expectation was this court would handle the class cert.
18 motions. By "this court" I mean the Northern District of
19 Illinois. That's my read of the record. It's a massive
20 record. You people are more familiar with it than I am, but
21 that was my sense. And I would not -- I'm not trying to duck
22 the responsibility here. I wouldn't mind ruling on the class
23 cert. motions on either of these motions.

24 MR. ISSACHAROFF: The only thing I would say about
25 that, your Honor, is that that expectation was, in fact, the

1 case, but it was formed at a time when *Daubert* and summary
2 judgment hadn't been addressed yet.

3 In light of the two -- your extensive ruling on
4 summary judgment and then the earlier rulings on *Daubert*, we
5 think that that's basically been resolved to the point that
6 it's a pretty mechanical act by the trial court. That's the
7 reason we are now urging that it go back.

8 But, again, we are perfectly prepared to have it
9 handled in this court. We just hope that it's not a source
10 of delay.

11 THE COURT: Thank you.

12 MR. ISSACHAROFF: You are welcome.

13 MS. MILLER: Good morning, your Honor.

14 Britt Miller on behalf of CDK.

15 THE COURT: Good morning.

16 MS. MILLER: We are the only defendant in the class
17 actions for these purposes. So I don't believe Ms. Gulley or
18 Mr. Caseria will be speaking on this.

19 THE COURT: Okay.

20 MS. MILLER: On the question of class
21 certification, we obviously agree with your Honor that class
22 certification in both classes should be decided here.

23 You are correct in your reading of the extensive
24 record in this case in terms of where we believe the Court
25 has always expected class certification was going to be done

1 and where the parties have always expected the class
2 certification was going to be handled.

3 As we noted in the submission that we gave to your
4 Honor yesterday, the plaintiffs, including Mr. Nemelka and
5 their clients, were expecting that it was going to be in
6 front of your Honor. And their original proposal to us was a
7 briefing schedule that it appear in front of your Honor. It
8 was only last week that we learned that they wanted it to go
9 back to the Western District -- I shouldn't say "go back" --
10 go to the Western District of Wisconsin for a resolution of
11 the class proceedings.

12 From our standpoint, we believe that they should be
13 both here. That's part of the pretrial proceedings that the
14 MDL, the court, traditionally expects are going to be handled
15 by the MDL transferee court because of the need to have these
16 things coordinated and the need for the rulings to be
17 consistent.

18 With respect to timing, the reality is, the
19 schedules that we have proposed, which is very close to what
20 the Dealers have proposed and only a few months off of what
21 the Vendors have proposed.

22 CDK is the only defendant in both of these. Part
23 of the goal of the MDL process is to have the efficiencies
24 addressed by one court and not put in a situation where one
25 party's interests are put above that of another.

1 We appreciate that the Vendors would like to go to
2 trial as soon as they can or have their motion decided as
3 soon as they can, but that can't be at the expense of the
4 Court or at the expense of CDK.

5 The most fair thing, and what we believe is
6 contemplated by the MDL process and contemplated by the
7 rules, is that your Honor will consider both. In all of the
8 cases that I have litigated over the past 25 years that are
9 antitrust cases I have never had the two decided differently.

10 I'm sure plaintiffs will find one or two where it
11 has been, but traditionally in these antitrust cases class
12 certification of both the indirect and the direct are done
13 together because there is overlap. They are going to be
14 relying on common proof as to what they say forms the portion
15 of the class.

16 They both submitted overcharge analyses with
17 respect to certain aspects of their damages models that are
18 going -- that are very similar. So that court is going to
19 have to consider those as part of its assessment of whether
20 or not class is appropriate here.

21 Given that, and so as to not overly burden CDK so
22 it's briefing two very similar -- not identical, but very
23 similar -- briefs on different schedules before this Court,
24 we would ask that the Court set everyone on the same
25 schedule.

1 Obviously, given how long this case has sat, there
2 is a certain amount of time that the parties and their
3 counsel and, quite frankly, their experts, who have gone off
4 and started to do other cases, need to get to get back
5 involved in this case, which is why we asked for a modest
6 extension to October. If your Honor believes that September
7 is appropriate, we will, of course, abide by that decision.

8 But it is more important, from our standpoint, that
9 the cases and the briefing move in tandem. There is going to
10 be *Daubert* briefing on these things. We suspect that some of
11 the grounds, if we move for a *Daubert* exclusion, are going to
12 be apply to the Vendors' experts and the Dealers' experts.

13 So keeping these moving in tandem is the most
14 important thing from CDK's perspective, second only to the
15 question of -- that it should be tried here -- the class
16 certification should be done here.

17 THE COURT: Okay. Just before I hear from anybody
18 else, tell me about the *Daubert* issues that you anticipate in
19 class cert.

20 MS. MILLER: The answer is, I don't -- as I sit
21 here, your Honor, it may be that we don't have any. I don't
22 know yet until I see some of the -- inevitably they are going
23 to be updating their damages model and updating their expert
24 reports that were submitted on summary judgment.

25 Until I have seen those and had an opportunity to

1 look at what those look like, I don't know which ones I have,
2 but I need to preserve the possibility of --

3 THE COURT: That they're --

4 MS. MILLER: -- having those and submitting those.

5 THE COURT: Right.

6 Anybody else from the defense side want to weigh in
7 on this? It sounds as though Ms. Miller has covered the --

8 MS. GULLEY: Not on that issue, your Honor. Thank
9 you.

10 THE COURT: All right.

11 Reply at all on this issue, or are we ready to just
12 move on?

13 MR. ISSACHAROFF: I would just say, your Honor,
14 that we have no experts in the class certification who have
15 not been through *Daubert* already.

16 Our expert damages model is current through the
17 beginning of July, so it needs to be updated for whatever the
18 months are going forward.

19 THE COURT: Right.

20 MR. ISSACHAROFF: But that methodology and that
21 expert has been through *Daubert* and was the subject of
22 extensive discussion in your Honor's summary judgment
23 opinion.

24 THE COURT: All right. You know, again, I don't
25 want to be completely arbitrary here, but I'm going to

1 suggest that we can resolve this by saying that the class
2 cert. motion should be filed by September 29th, and then we
3 can add appropriate time for -- about six weeks for a
4 response, and another -- it looks like it's about six weeks
5 for reply.

6 And then there was a suggestion that we also set a
7 date for replies in support of any *Daubert* challenges. I can
8 suggest that one would be six weeks out as well, with the
9 understanding that it may or may not happen.

10 All right. And I will do the math. I don't have
11 my calendar right here, but I will do the math, but if you
12 can just recognize that that's what it's likely to be.

13 MS. MILLER: Your Honor, with apologies, if I could
14 ask for a slight change on the date?

15 That date is -- I hate to admit this on the
16 record -- is my 50th birthday, and I will not be in town.

17 THE COURT: Well, happy birthday. Okay.

18 MS. MILLER: If we could move that --

19 THE COURT: Wait. Which date is that?

20 MS. MILLER: September 29th date.

21 THE COURT: Now you are going to get flowers and
22 candy.

23 MS. MILLER: Flowers and candy, all of those are
24 welcome.

25 THE COURT: All right. Should we do it a little

1 before or after?

2 MS. MILLER: If you can give me a couple days after
3 so I can --

4 THE COURT: Sure. The 29th is a Friday. So why
5 don't we say October 3rd.

6 MS. MILLER: Thank you, your Honor.

7 THE COURT: And then same with -- the rest of the
8 dates would get pushed as well.

9 All right. What's our next issue?

10 MS. MILLER: On the remand issue, your Honor, I
11 appreciate that you have indicated your initial thought is to
12 agree with AutoLoop.

13 As we said in our brief, we would like the
14 opportunity to put it before you in a full briefing. We
15 wouldn't hold up any of the proceedings, but we don't think
16 that it's properly -- it should be under 1407. We think it's
17 a 1404 analysis. And we would like the opportunity to submit
18 those papers to your Honor.

19 Again, we won't ask that any of the other deadlines
20 be held up. But now that your Honor has ruled that we are
21 doing class certification here, it shouldn't hold up the
22 class issue.

23 THE COURT: Right.

24 I don't have a problem with considering a brief on
25 this issue.

1 I guess -- backing up from the specifics of this
2 case, I guess my sense is, it just can't be that the MDL
3 process was intended to bring a merits decision before the
4 transferee judge.

5 In actual practice, that's what happens most of the
6 time. But in actual practice, most cases are resolved by the
7 transferee judge. But the model was that the transferee
8 judge handles matters up until time for trial, and then it's
9 returned whence it came.

10 In this case, in your view, where would venue
11 properly be, assuming there were no MDL process in place?

12 MS. MILLER: From our standpoint, we think they
13 filed here. They should be here. The artifice of putting in
14 a footnote and saying, we are not going to go file in the
15 Western District of Wisconsin -- it was never in the Western
16 District of Wisconsin. It was only ever filed here.

17 THE COURT: But, again, assuming there were no
18 MDL process and no direct filing order -- again, I don't --
19 personal preference. I don't like them. I inherited this
20 case from two colleagues. I abide by their processes.

21 But in general, I like -- I resist direct filing
22 orders, because I don't want someone later on to say, no, the
23 case belongs here. No, the case belongs there. And that's
24 what we're dealing with.

25 So you are saying to me that, had there been no MDL

1 process in place, the case would properly have been venued
2 here.

3 Why did the plaintiffs choose Wisconsin, then?

4 MS. MILLER: I suspect they chose Wisconsin because
5 the first filed case was a case called *Authenticom v. CDK and*
6 *Reynolds*, which is a Wisconsin company. AutoLoop is not. I
7 don't remember where they were incorporated. I want to say
8 it was Texas or somewhere in the south. But they have since
9 been bought, and I believe their new company is based,
10 actually, here in Chicago.

11 But I suspect they wanted to be in the Western
12 District of Wisconsin because Authenticom, which was the
13 first filed case and which has been resolved -- Authenticom
14 has settled all of its claims as against both CDK and
15 Reynolds. So it is no longer there.

16 So there have been no proceedings vis-à-vis
17 AutoLoop in the Western District of Wisconsin. But they are
18 represented by the same counsel as Authenticom, and I suspect
19 they wanted it tried up there because that's where the
20 initial Authenticom preliminary injunction hearing was held.

21 THE COURT: Okay. Well, that doesn't -- okay.
22 That's interesting. That doesn't sound like judge shopping.

23 MS. MILLER: I'm not accusing them of judge
24 shopping. I'm saying it has no -- there is no reason it
25 needs to go to the Western District of Wisconsin. It has no

1 connection to there.

2 Again, we take the position that they filed here.
3 They should be here regardless of whether or not the MDL
4 existed.

5 Now, if they had filed in the Western District of
6 Wisconsin without the MDL, we would be in the Western
7 District of Wisconsin. If they had filed in Texas, we would
8 be there.

9 THE COURT: But isn't it true that they filed here
10 because there was a direct filing order?

11 MS. MILLER: I don't know that we characterize
12 Judge St. Eve's order in that way. She said, go ahead and
13 file your complaint. I don't think she made an affirmative
14 ruling.

15 THE COURT: Okay.

16 MS. MILLER: That's one of the reasons we wanted
17 to -- although we appreciate your Honor has taken the time to
18 read the status report, it's not the full sort of history of
19 what has happened here. We didn't want to do a full briefing
20 before your Honor before this morning's hearing.

21 THE COURT: It's always scary to know that 25 pages
22 is not the full briefing.

23 MS. MILLER: There are a lot of issues in here.

24 THE COURT: Right. That's true.

25 MR. ISSACHAROFF: Your Honor --

1 THE COURT: Mr. Issacharoff.

2 MR. ISSACHAROFF: -- we think that this is squarely
3 controlled by *Looper*. Judge Hamilton's opinion with
4 Judge St. Eve on the panel -- who was reflecting, no doubt,
5 on her experience in this case -- takes the position that
6 where there is a direct filing capability, the cases retain
7 the character of where they would have been filed.

8 And in *Looper*, the connection was even more
9 extenuated than it is here, because here we had ongoing
10 litigation in Wisconsin. We were hoping to go to trial soon
11 in Wisconsin. AutoLoop wanted to be part of that same
12 proceeding.

13 So we were under a direct -- there is a direct
14 colloquy with Judge St. Eve in this court that says that we
15 preserve the character of it as the Western District. We put
16 that in a footnote in the complaint and in the amended
17 complaint. And I think that *Looper* controls.

18 As for the 1404 analysis, my view is that that's
19 squarely foreclosed by *Lexecon*, that *Lexecon* takes away from
20 a transferee court the ability to issue 1404 orders into
21 itself.

22 The only way for this court to use 1404 would be if
23 the Wisconsin court were to transfer it here, and there is no
24 request for that to be done.

25 So under *Looper*, we think the issue is squarely

1 foreclosed.

2 And it would be -- there is sort of an estoppel or
3 prejudice issue here, because we did so in discussion with
4 the Court, that we are preserving our rights. Judge St. Eve
5 said, yes, you are preserving your rights.

6 It would be astounding for us to be now in the
7 position that we lost our rights by relying on the
8 representation of the Court.

9 This is exactly what the *Cook* defendants argued in
10 *Looper*, and Judge Hamilton said, no, you can't have it both
11 ways. You can't both induce a direct filing and then try to
12 claim that it has no effect.

13 THE COURT: With respect to preserving your rights,
14 it is a right under the *Lexecon* issue. There is also the
15 possibility of a *Lexecon* waiver. And I'm hearing from
16 plaintiff how badly they want an early trial date and the
17 concern about getting a 23 case number on it or maybe even
18 24, God forbid.

19 It's just a comment.

20 MR. ISSACHAROFF: Yes, there are many ways that
21 this could be handled. But our view is, as of this moment,
22 our client wants to go to trial in Wisconsin.

23 And we have preserved that issue squarely from the
24 very beginning of the filing of the *Looper* -- AutoLoop case.
25 We have never wavered on that position.

1 THE COURT: Well, I am going to allow Ms. Miller to
2 submit a brief.

3 Tell me how much time you need for that,
4 recognizing that it's not going to slow down the class cert.
5 proceeding.

6 MS. MILLER: Can I get three weeks, your Honor?

7 THE COURT: Twenty-one days is fine.

8 MS. MILLER: Thank you.

9 THE COURT: And response from the plaintiff.

10 MR. ISSACHAROFF: We just need a week, your Honor.

11 THE COURT: Okay. Seven days for a response, and
12 seven days for a reply.

13 MR. ISSACHAROFF: And how long are these briefs,
14 your Honor?

15 THE COURT: They are absolutely no more than
16 15 pages.

17 MS. MILLER: I assume the district limits.

18 THE COURT: Right.

19 MR. ISSACHAROFF: I was hoping for less, your
20 Honor, but --

21 THE COURT: Well, I am happy to make it 10.

22 MR. ISSACHAROFF: I think that's more than
23 appropriate for this.

24 MS. MILLER: I would ask for 15, your Honor.

25 THE COURT: Fifteen is good. We will stick with

1 15.

2 I mean, one of the reasons -- the key reason that
3 it took months and months for you to get a ruling from me is,
4 a judge left. I had to start all over. I didn't really know
5 anything about the case. We have got a big court. I didn't
6 know anything about it.

7 Starting from scratch, I ended up issuing an
8 opinion that, from my perspective, is really long, but there
9 were a lot of issues and a lot of motions that were addressed
10 there. So I would like to bring us back to a more reasonable
11 length of everything.

12 Anyway -- okay. So we have got a briefing schedule
13 on the 1404 versus 1407 issue.

14 We have got tentative dates on the class cert.
15 issue.

16 What is our next matter to resolve?

17 MS. MILLER: I think the next issue, your Honor,
18 would be the 1292(b).

19 THE COURT: Got it.

20 MS. WEDGWORTH: Your Honor --

21 MS. MILLER: We are the one that raised it. I am
22 happy to tee the issue up, your Honor.

23 As we said in the status report, and as your Honor
24 has already said, you are inclined to allow that briefing.
25 We appreciate that opportunity to address the *Shady Grove*

1 opinion.

2 As we committed in the status report, we would not
3 take the position that that has to hold up the other
4 proceedings as well, but we would like the opportunity for
5 the Seventh Circuit to consider that issue.

6 MS. WEDGWORTH: Your Honor, I'm aware of your
7 opinion and your comments there concerning the *Shady Grove*
8 issue.

9 However, even if this went to the Seventh Circuit
10 now, if you were inclined to 1292(b) it, as Judge Posner has
11 said, the resolution of this issue, 1292(b), will not in any
12 way advance the litigation.

13 There will still be 20 states going forward. At
14 most, six states might drop out -- might. So instead of
15 26 states pursuing it, there will be 20.

16 We also have a nationwide class of dealers who are
17 still pursuing injunctive relief under the Sherman Act. That
18 will still go forward.

19 So those claims will not go away. The litigation
20 will not change. There is good case law on this, *Brodsky v.*
21 *Humana*. You may be familiar with some of it as well.

22 THE COURT: Sure.

23 MS. WEDGWORTH: Judge Holderman wrote the *Brodsky*
24 opinion and Posner wrote the opinion in the *Richardson v.*
25 *Panache* case that I am referring to, where he quoted it.

1 There is also the issue of the 23(f). As you know,
2 if a class cert. opinion comes out, a 23(f) appeal is
3 possible.

4 So there have been opinions -- Posner being one of
5 them -- to say some of this movement of 1292(b) really is
6 premature when you have a class cert. opinion coming and
7 there is the possibility of 23(f).

8 So on several grounds, the 1292(b) issue would not
9 resolve or in any way speed up the completion of this
10 litigation.

11 THE COURT: It wouldn't speed things up. I think
12 you are right about that.

13 I guess my thinking is -- and this is kind of where
14 I always am in cases of this magnitude. You have to think
15 about what the result is going to be and whether or not there
16 is going to be a big damages award and what size and maybe
17 the case can be settled and maybe it can't be settled because
18 of the status of the law in one state versus another.

19 So if there is a reason to believe that early
20 resolution of the *Shady Grove* issue might clarify the amount
21 of money involved here, I think that's worthwhile.

22 The other thing is, the cases -- that issue is not
23 going away. So that case -- that issue might very well get
24 appealed one way or another. And it is disputed.

25 I think I'm right, but I recognize that not every

1 court has seen it that way. So it might really be worth
2 getting the Court of Appeals to address it when it's going to
3 be pretty effectively briefed and already has been. So it
4 would be a matter of brushing up and maybe bringing your past
5 briefs on the issue up to speed if there is anything new. I
6 don't know.

7 I will take a look -- obviously you are going to
8 resist the 1292 motion, but that hasn't been made yet. So
9 once it is, I can take your briefs on that.

10 Maybe I should ask. Are we on kind of a similar
11 schedule there?

12 MS. MILLER: Yeah. Your Honor, to your point,
13 that's why we want to brief it now. We may not have to brief
14 certain things on class certification. Your Honor may not
15 have to decide them if they are resolved by the *Shady Grove*.
16 I mean, going into trial, we may want to know what it is. We
17 think it's beneficial to have this issue resolved now.

18 In terms of filing, yes, we can get our brief on
19 file within three weeks, on the same schedule, if your Honor
20 would like it.

21 THE COURT: I don't anticipate that I will get
22 guidance from the Court of Appeals on this issue before class
23 cert. ruling.

24 MS. MILLER: Depending on which panel, we may or we
25 may not. But I appreciate that it will be -- to your point,

1 it will be instructive to the parties going forward whether
2 or not certain claims are in or certain claims are not in.

3 THE COURT: Remember, even if I certify something
4 for appeal, I have been told before by the people upstairs,
5 no.

6 MS. MILLER: They may not want it.

7 THE COURT: Right.

8 MS. WEDGWORTH: Just two extra points.

9 We are reserving our right, if you do, in fact,
10 grant the 1292(b), that we may also cross-appeal with regard
11 to the issue of the direct damages that our expert,
12 Mr. Williams, calculated on behalf of direct purchasers,
13 which led into the preclusion of that, both at the *Daubert*
14 motion, and then your opinion as well carried that out
15 further.

16 So we would certainly consider that, if you are
17 going to go forward, that we would take up that issue as
18 well.

19 Again, we do believe that the timing issue, as you
20 just pointed out, will not resolve what's going to go on in
21 class certification. That may very well be complete long
22 before the Seventh Circuit rules on this issue.

23 And at that point, it's really too late. We are
24 going to be at 23(f). Again, 23(f) is that opportunity again
25 for those types of things, as Posner had laid out in that

1 case.

2 MS. MILLER: Also, your Honor, if she is going to
3 raise 1292 on the class that is currently not there, that may
4 introduce all sorts of all new things that we have to
5 address, because suddenly that's a class that we are
6 currently not addressing in class certification because those
7 claims are gone.

8 So if Ms. -- of course she can preserve whatever
9 rights she would like to. But if that issue is going to be
10 briefed on 1292, that could have an impact on class cert.
11 certainly.

12 MS. WEDGWORTH: We are entitled to, and we are
13 certainly considering that.

14 THE COURT: It's complicated.

15 I will consider the briefs when I get them, the
16 schedule that you have proposed, assuming that that's
17 acceptable to the plaintiffs, the three weeks and then seven
18 days, seven days.

19 MS. WEDGWORTH: Actually, we would want longer than
20 seven days. We don't know the full extent of everything they
21 are arguing. So we are going to ask for three weeks as well.

22 THE COURT: All right. So 21 days for the 1292(b)
23 motion, and then -- I am writing this down. Hold on.

24 MS. MILLER: And I'm sorry. Is that both -- if
25 Ms. Wedgworth is going to raise her issue, that they are both

1 going to be due on that 21 days?

2 THE COURT: No. I was expecting that that would be
3 maybe a -- well, I don't know.

4 How do you feel about that?

5 MS. WEDGWORTH: Your Honor, to fully understand the
6 motion, we would like to file it -- if we are going to file
7 our own cross 1292(b), to at least have a week to evaluate
8 the 1292(b) motion filed by CDK.

9 THE COURT: Okay. We will say 21 days would be
10 CDK's -- a date for CDK's 1292(b) motion.

11 Twenty-one days would be the date for plaintiffs'
12 response and potential cross-motion.

13 Fourteen days for a reply/response, if there is a
14 counter 1292(b) motion.

15 And if that has been filed, then seven days for a
16 reply in support of plaintiffs' 1292(b) motion.

17 That's now as clear as mud, right?

18 MS. MILLER: I followed it.

19 MS. WEDGWORTH: Thank you, your Honor.

20 THE COURT: Good.

21 What other matters do we need to address this
22 morning?

23 MS. WEDGWORTH: Your Honor, for Dealers, I think I
24 may be the only one who hasn't commented on the timing of the
25 class cert. schedule.

1 So your proposed class cert. schedule, I do
2 believe, where you are indicating the end of September as
3 class cert. motion filing works for us as well.

4 THE COURT: Well, it's now October 3rd.

5 MS. WEDGWORTH: Due to birthday celebrations, we're
6 happy to go with --

7 MS. MILLER: I truly do appreciate it.

8 THE COURT: She is getting cake. She's getting --

9 MS. WEDGWORTH: So October 3rd, once the
10 celebration has died down, we will be filing.

11 THE COURT: Thank you.

12 MS. GULLEY: Thank you, your Honor.

13 I don't actually have anything to add on the
14 merits, but just to come back to MVSC, just to put on the
15 record that Reynolds appreciates your Honor taking on the
16 discovery motion. Thank you.

17 THE COURT: And then, Reynolds and Reynolds, I'm
18 going to be doing that. That's a sanction issue. That's
19 what you meant?

20 MS. GULLEY: The discovery motions, yes, where they
21 have requested sanctions.

22 THE COURT: All right.

23 MS. WEDGWORTH: And I do have one final issue, your
24 Honor.

25 A trial date. We, too, have been litigating since

1 2018. And as I frequently speak to dealers, they keep asking
2 me, "When will we have a trial date?"

3 And I think in our papers last round -- of course,
4 it was a flurry to get it out yesterday -- I've asked for
5 August of this year.

6 So we would like to have a trial date locked in.
7 Happy to do what needs to be done to get that trial date.

8 MS. MILLER: I think she means August of next year.
9 You said August --

10 MS. WEDGWORTH: Fair point. Fair point.

11 THE COURT: I was going to say, I don't see how you
12 can be ready in August.

13 MS. MILLER: I know you are good, but, I mean, come
14 on.

15 MS. WEDGWORTH: Fair point. Fair point.

16 THE COURT: August 2024 is fine.

17 MS. MILLER: Your Honor, if we can respond to that?

18 THE COURT: Sure.

19 MS. MILLER: We are concerned -- well, obviously,
20 your Honor will address the remand issue with respect to
21 AutoLoop, because we think, obviously, the cases should be
22 tried here and both of them should be tried together.

23 But we don't -- we think it's premature at this
24 point to set a trial date until we are a little farther down
25 in the process on class certification and the like. So

1 August '24 is not something we are prepared to agree to.

2 We are happy to have a conversation with
3 Ms. Wedgworth and have that conversation.

4 We also -- if, in fact, your Honor ultimately rules
5 that the case is going to go back to the Western -- I
6 shouldn't say -- I have to stop saying "going back" -- going
7 to the Western District of Wisconsin, we will potentially
8 have two competing trials.

9 So we would ask your Honor to wait a bit to figure
10 out whether or not this is going to actually get remanded and
11 what the scope of the claims are. If we are successful on
12 class certification on some or all of the classes that are
13 being proposed, then how we prepare for that trial is going
14 to be markedly different.

15 MS. WEDGWORTH: Remanding or scope shouldn't affect
16 the trial date at all. Once class cert. is complete and once
17 notice goes out, a trial date is set.

18 August 2024 will be six years -- over six years
19 from the filing of this complaint.

20 Many dealers keep asking me, "Is there going to be
21 a trial?" and, "What is the date?"

22 August 2024, given -- no matter what the scope is,
23 no matter what the remand is, the trial date for our case can
24 be set.

25 THE COURT: I am guessing -- what are we talking

1 about? Two weeks? How long a trial are you talking about?

2 MS. WEDGWORTH: Certainly two weeks.

3 MS. MILLER: We think probably longer than that.

4 We are thinking somewhere between three, three and a half.

5 THE COURT: Okay. That seems very reasonable to
6 me, and that's the reason I think we do need to get a date on
7 the calendar, because what happens, if not, is it gets
8 pushed.

9 I won't be impossible with you if we are not able
10 to proceed on a date in August 2024, but I really do want to
11 put it on the calendar, because otherwise you are going to
12 lose that sense of urgency, and I might -- I really might not
13 have time.

14 Let's look at --

15 MS. MILLER: Your Honor, we would ask for at least
16 another month or two to account for other trial obligations
17 that we have. But if your Honor rules August 2024, then we
18 will abide by it.

19 THE COURT: Okay. Let me tell you that -- and I am
20 revealing to my staff for the first time -- I am hoping to
21 take a pretty extended vacation in August 2024. So why don't
22 we -- and they are thrilled, of course.

23 (Laughter.)

24 MS. WEDGWORTH: That's a positive announcement.

25 THE COURT: But I think we could look at September

1 of that year or October.

2 MS. WEDGWORTH: So the Tuesday after Labor Day,
3 perhaps?

4 MS. MILLER: October would be preferable.

5 THE COURT: How about the middle of September 2024?

6 MS. MILLER: You all can celebrate my 51st.

7 (Laughter.)

8 THE COURT: We are looking forward to that.

9 Why don't we take a look at the 18th or the 25th of
10 September.

11 MS. MILLER: May I grab my calendar, your Honor?

12 THE COURT: Sure.

13 MS. MILLER: Thanks.

14 (Brief pause.)

15 MS. WEDGWORTH: So September 24 is a Wednesday.

16 The 18th is --

17 THE COURT: Oh, 24 is a --

18 MS. MILLER: September -- I'm sorry. What were the
19 dates you were looking at, your Honor?

20 THE COURT: Maybe this is wrong.

21 THE CLERK: What day do you want --

22 MS. WEDGWORTH: The 18th appears to be a Wednesday.

23 MS. MILLER: The 18th is a Wednesday.

24 THE COURT: Oh, then this is -- these are wrong.

25 This must be wrong.

1 Okay. I will tell you what. The 18th is a
2 Wednesday. In that case, what I would propose -- this is a
3 jury, right? Or is it?

4 MS. WEDGWORTH: Yes.

5 THE COURT: Okay. What I would propose is that we
6 start on the 20th. And the reason I suggest that is, I like
7 to pick a jury on a Thursday or a Friday for a couple of
8 reasons.

9 One, the other judges don't like those dates. So
10 we generally get the jury pool to ourselves, which is really
11 helpful.

12 The other thing is, if we can pick the jury -- it
13 takes the better part of a morning in a day. I like for
14 people to come in on Monday morning and not have that on
15 their plate. In other words, they come in and they are ready
16 to do their openings or ready to call their first witness or
17 whatever it is, as opposed to thinking about, how long is it
18 going to take me to get my jury picked?

19 So I would like to start on, maybe, the 20th.

20 MS. WEDGWORTH: That works.

21 THE COURT: All right. We will set it for
22 September 20th with the understanding it's at least three
23 weeks, maybe even a little longer. And that way, if I -- you
24 know, I will have that time set aside.

25 Okay. Recognizing, Ms. Miller, that that date

1 might ultimately not work or might conflict with anything
2 that Judge Peterson, or whoever it is in Wisconsin, does,
3 assuming the AutoLoop case is going there, I can certainly
4 revisit this if that's appropriate.

5 What other issues do we have?

6 MS. MILLER: I believe that's the list.

7 MS. WEDGWORTH: None here.

8 THE COURT: I do want to ask, have you talked about
9 settlement before, during, or after my ruling? Is that
10 something that we ought to be talking about now?

11 MS. WEDGWORTH: We certainly can make those
12 efforts, your Honor.

13 THE COURT: Okay. I'm going to suggest that you do
14 you that. And I'm going to also suggest that you let me know
15 if you are interested in dealing with a magistrate judge on
16 that or if you think it would make sense to talk to a
17 mediator of some kind. And if you have a dispute about that,
18 if that's something I can help you resolve, I am open to it.

19 I realize there is more than one -- technically
20 more than one case we are talking about here. So there are
21 several moving parts. But I think it makes sense to explore
22 the possibility, especially because the case has been, from
23 your perspective, dormant for quite a while. But now it's
24 back in action, and it's going to mean a lot of work for all
25 of us and uncertainty -- ongoing uncertainty for your

1 clients, including, as you mentioned, a bunch of dealers who
2 keep wondering what's going on.

3 All right. So I'm going to ask that you let me
4 know in about 14 days whether you would like the court's
5 involvement or assistance in that process. I will take
6 whatever steps you request or that I think are appropriate at
7 that point.

8 Any other issues?

9 MS. MILLER: No, your Honor.

10 MS. WEDGWORTH: No, your Honor. Thank you.

11 MR. NEMELKA: Your Honor, we just wanted to thank
12 you for your efforts on the summary judgment ruling, starting
13 from scratch on that. We understand the work that was
14 involved.

15 THE COURT: I had terrific assistance from my team
16 of law clerks.

17 MR. NEMELKA: Thank you.

18 MS. MILLER: Thank you, your Honor.

19 THE COURT: Thank you.

20 (An adjournment was taken at 10:43 a.m.)

21 * * * * *

22 I certify that the foregoing is a correct transcript from the
23 record of proceedings in the above-entitled matter.

24 /s/ Frances Ward August 4, 2023.
25 Official Court Reporter
F/j